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## State Employees And The Fair Labor Standards Act

### *Maryland v. Wirtz*<sup>1</sup>

In this action the State of Maryland, with twenty-five other States<sup>2</sup> intervening as parties plaintiff, sought to have the 1966 Amendments to the Fair Labor Standards Act<sup>3</sup> declared unconstitutional insofar as they applied to State employees engaged in the public schools and

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1. 269 F. Supp. 826 (D. Md. 1967).

2. Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Vermont, Virginia, Wyoming.

3. 80 Stat. 830 (1966), *amending* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1964).

hospitals, and to enjoin enforcement of the Act, as amended, against the States.

The plaintiff States attacked the constitutionality of the 1966 Amendments on three major grounds:<sup>4</sup> (1) since the activities of the States in the area of schools and hospitals are non-profit, purely governmental, and neither in competition with, nor capable of substitution by, any non-governmental system, these activities could not legitimately be termed commerce; (2) the "Enterprise" concept is an unconstitutional expansion of the Congressional power over commerce; and (3) the coverage of State employees impugns State sovereignty in violation of the tenth amendment.<sup>5</sup>

The defendant contended that federal power comprehends not only that which is interstate commerce but also that which affects interstate commerce and, in this sense, embraces the designated State activities; that in enacting the "Enterprise" concept, the Congress neither exhausted nor exceeded its constitutional authority over commerce; and that the contested inclusion of State employees does no violence to the tenth amendment.

A divided three-judge court entering three separate opinions upheld the constitutionality of the challenged provisions and denied the requested injunctive relief. The States are preparing an appeal to the Supreme Court of the United States.<sup>6</sup>

The Fair Labor Standards Act was passed by Congress in the exercise of its constitutional power to regulate commerce.<sup>7</sup> The commerce clause has "throughout the [Supreme Court's] history been the chief source of its adjudications regarding federalism."<sup>8</sup> Beginning with *Gibbons v. Ogden*<sup>9</sup> and continuing to the present day, the Court has been faced with the problem of defining the nature and extent of the grant of power to Congress to regulate commerce among the several states in the light of the competing demands of state sovereignty. In the early days, the position of the fledgling central government vis-a-vis the states was one of relative weakness. Every advance of federal power in the field of commerce was viewed by the states as an unwarranted intrusion upon their sovereign prerogatives and was correspondingly resisted. The task of the Court in defining the extent of federal power was, therefore, essentially that of determining what, if any, limitations were imposed upon the States by the constitutional grant of power over

4. In addition, Maryland raised an eleventh amendment objection to § 216 of the Act which permitted an employee to bring suit against his employer for alleged denial of benefits if suit was not brought by the Secretary of Labor. The court dismissed this argument as premature, and necessarily dependent on final adjudication of the basic validity of the 1966 Amendments. Maryland and Texas also argued that the commodities purchased out of the state by the schools and hospitals were not "goods" within the meaning of § 203(i) of the Act and that, as the "ultimate consumers" of such commodities, they were not intended to be covered. The court dismissed this argument as being one of statutory construction, not of constitutional significance.

5. U.S. CONST. amend. X: the Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.

6. 36 U.S.L.W. 3194 (U.S. Nov. 7, 1967).

7. U.S. CONST. art. I, § 8.

8. F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 67 (1937).

9. 22 U.S. (9 Wheat.) 1 (1824).

commerce to Congress. In the last hundred years, however, the enormous growth of the national government has been accompanied by an ever-increasing expansion of authority into areas formerly considered the exclusive domain of the States. This development has forced the historic question concerning the extent of the federal commerce power to be posed in different terms. This question is dramatically presented by the instant case and may be stated as follows: "What, if any, limitations does the Constitution impose upon Congress in the exercise of its power over interstate commerce?"

In *Gibbons v. Ogden*, Chief Justice John Marshall defined commerce as "something more" than barter or traffic. "Commerce . . . is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."<sup>10</sup> Recognizing the organic nature of commercial transactions, he wrote, "Commerce among the states, cannot stop at the external boundaryline of each state, but may be introduced into the interior."<sup>11</sup> The federal power over commerce, he asserted, "[L]ike all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution [*sic*]."<sup>12</sup> Nevertheless, he cautioned, "It is not intended to say, that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states."<sup>13</sup> For the next century, in a kaleidoscopic array of contexts, the Court experimented with formulae for defining and differentiating that which was interstate commerce and, hence, subject to federal regulation, from that commerce which was subject only to the police power of the States.<sup>14</sup>

By 1914, acknowledging the functional interdependence of intrastate and interstate activities wrought by scientific and technological advances,<sup>15</sup> the Court abandoned the concept of two mutually exclusive areas of control. In the famous *Shreveport Rate Case*,<sup>16</sup> it held that federal regulatory authority extended to those local activities which so impinge upon interstate transactions "that the government of the one

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10. *Id.* at 189.

11. *Id.* at 194.

12. *Id.* at 196.

13. *Id.* at 194.

14. *See, e.g.*, *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) (mining is not interstate commerce); *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895) ("Commerce succeeds to manufacture, and is not a part of it"); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868) (business of insurance is local even though policies made across state lines); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) (subjects by their nature national and admitting only of "one uniform system of control," belong exclusively to Congress; subjects by their nature "imperatively demanding . . . diversity" belong to the States); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) (imported goods in their original packages are not subject to State license tax until the original packages have been broken up and mixed with the general property of the State).

15. *See, e.g.*, *United States v. Ohio Oil Co.*, 234 U.S. 548 (1914) (transmission of oil by pipe line is interstate commerce); *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1 (1877) (communication by telegraph is interstate commerce).

16. *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914) (intrastate rates of carriers so closely affect interstate rates that federal control is required).

involves the control of the other." In the area of remedial social legislation, however, the Court, while never expressly rejecting this principle, effectively nullified it. Such matters as child labor in manufacturing,<sup>17</sup> employer-employee relationships in the coal industry,<sup>18</sup> and codes of fair competition in the poultry trade<sup>19</sup> were deemed to be either completely divorced from or so indirect in their effects on interstate commerce that federal regulation of such matters was held to be beyond the power of Congress in the exercise of the commerce power. In 1937, however, in the landmark case of *NLRB v. Jones & Laughlin Steel Corporation*,<sup>20</sup> the Court refused "to shut [its] eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum"<sup>21</sup> in considering the constitutionality of the National Labor Relations Act. The defendant corporation was organized on a national scale; the manufacture of steel in its Pennsylvania plants was not an isolated, local activity, but part of a completely integrated enterprise, involving many component activities and the flow of goods across state lines, beginning with the shipment of raw materials and ending with delivery of the finished product. The Court held that disruption of these far-flung activities would have a most serious effect on interstate commerce, which would be immediate and perhaps catastrophic. "[I]nterstate commerce itself," the Court said, "... is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience."<sup>22</sup> For this reason, federal regulation of the defendant corporation's labor relations was upheld as essential to "protect interstate commerce from the paralyzing consequences of industrial war."<sup>23</sup> No Act of Congress based on authority drawn from the commerce clause has been invalidated by the Court since the *Jones & Laughlin* decision. The inquiry became not "whether" but "which" intrastate activities so affected interstate commerce as to justify federal regulation. In *United States v. Darby*,<sup>24</sup> in which the constitutionality of the Fair Labor Standards Act was first upheld, employees of a Georgia lumber manufacturer who shipped some of his product out-of-state were held to be covered by the Act's minimum wage and overtime provisions. In reaching its decision, the Court stated:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.<sup>25</sup>

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17. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

18. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

19. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

20. 301 U.S. 1 (1937).

21. *Id.* at 41.

22. *Id.* at 41-42.

23. *Id.*

24. 312 U.S. 100 (1941).

25. *Id.* at 118.

By this test, federal power was held to encompass such apparently local activities as construction of buildings,<sup>26</sup> local sales of electric power,<sup>27</sup> the growing of wheat for personal consumption,<sup>28</sup> the operation of a motel,<sup>29</sup> and the operation of a restaurant.<sup>30</sup>

Such activities at least conform to the ordinary connotation of the word "commerce" as "business" or profit-making activity. But the Court has found that the reach of the commerce power extends further. In *Powell v. United States Cartridge Co.*,<sup>31</sup> the Court again declared what it had found as early as *Caminetti v. United States*,<sup>32</sup> that an activity could be subject to federal regulation under the commerce clause, even if the profit motive usually associated with commercial activity was lacking. As the cases developed, the Seventh Circuit held that mere interstate transmission of documents<sup>33</sup> was sufficient to warrant federal regulation. Even before the *Powell* decision, however, the Court had sustained the thrust of Congressional authority beyond what is normally considered "business" or "commercial" activity into the area of social and remedial legislation. The underlying rationale of the Court was that since Congress had the power to regulate the channels of interstate commerce, it could act to prevent those channels from being used for harmful or illegal purposes, such as transporting stolen articles across State lines<sup>34</sup> and kidnapping.<sup>35</sup> Additionally, on the positive side, Congress could act to promote and foster improved conditions in such areas as labor relations where disputes and work-stoppages might burden or obstruct the flow of goods in commerce.

Thus, in 1938, in enacting the Fair Labor Standards Act, Congress undertook, through the exercise of its power over interstate commerce, "[t]o correct and as rapidly as practicable to eliminate" harsh labor conditions, which, by leading to labor disputes, interrupted, burdened, and obstructed "the free flow of goods in commerce" and constituted "an unfair method of competition in commerce."<sup>36</sup> Accordingly, a

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26. See, e.g., *Plumbers' Union v. Door County*, 359 U.S. 354 (1959). See generally Annot., 8 A.L.R.2d 738 (1949).

27. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

28. *Wickard v. Filburn*, 317 U.S. 111 (1942).

29. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

30. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

31. 339 U.S. 497 (1950). See also *Mitchell v. Empire Gas Engineering Co.*, 256 F.2d 781 (5th Cir. 1958).

32. *Caminetti v. United States*, 242 U.S. 470 (1917).

33. *Beneficial Finance Co. v. Wirtz*, 346 F.2d 340 (7th Cir. 1965). This was foreshadowed by the holding in the famous Lottery Case, *Champion v. Ames*, 188 U.S. 321 (1903).

34. *Brooks v. United States*, 267 U.S. 432 (1925).

35. *Goch v. United States*, 297 U.S. 124 (1936).

36. 29 U.S.C. § 202(a) (1964), recited the Congressional finding that:

[T]he existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

minimum hourly wage<sup>37</sup> and a maximum work-week with time-and-one-half pay for overtime<sup>38</sup> were provided for those employees who were engaged in commerce, or in the production of goods for commerce, or in related activities necessary to the production of goods for commerce. Employees of the States and their political subdivisions were excluded from the protection of the Act, as the term "Employer" as defined in the Act expressly excluded such entities.<sup>39</sup>

In 1949, coverage was somewhat restricted by requiring that those employees not actually "in" production of goods for commerce be engaged in activities not merely "necessary" but "closely related" and "directly essential" to such production in order to be included.<sup>40</sup>

In an about-face in 1961, the "Enterprise" concept was introduced,<sup>41</sup> thus bringing under the Act's protective umbrella a vast segment of the labor force which had previously been excluded. The "Enterprise" concept was, essentially, a broad, additional test for determining coverage. Under the "Enterprise" concept, an employee, if unable to establish his personal engagement in commerce, or in the production of goods for commerce, or in "essential" related activities, could nevertheless establish his claim to coverage by demonstrating that the enterprise employing him was itself engaged in commerce. An enterprise was deemed to be so engaged if it satisfied an annual gross sales volume test and had employees "handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person."<sup>42</sup> The minimum wage and overtime provisions

37. Fair Labor Standards Act of June 25, 1938, ch. 676, § 6(a), 52 Stat. 1060: Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour. . . .

38. *Id.* § 7(a):

No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a work week longer than forty-four hours during the first year from the effective date of this session . . .

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

39. *Id.* § 3(d):

'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

40. Fair Labor Standards Amendments of Oct. 26, 1949, ch. 736, § 3(b), 63 Stat. 910.

41. 29 U.S.C. §§ 203(r), (s) (1964).

42. *Id.* § 203(r) defines "Enterprise" as:

[T]he related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. . . .

§ 203(s) states:

'Enterprise engaged in commerce or in the production of goods for commerce' means any of the following activities of which employees are so engaged, in-

of the Act extended to *all* employees of such an enterprise not expressly exempted,<sup>43</sup> even if their personal duties were performed exclusively intrastate and were remote from interstate commerce.

In 1966, the enterprise basis of coverage was expanded to embrace public, as well as private, enterprises engaged in operating schools, hospitals, and related institutions, whether for profit or non-profit.<sup>44</sup> The exemption from coverage of State employees which had persisted through seven earlier amendments<sup>45</sup> was removed. The definition of "Employer" was amended to include a State or a political subdivision thereof with respect to such of its employees as were engaged in the public schools, public hospitals, and related public institutions.<sup>46</sup>

In view of the remedial nature of the Fair Labor Standards Act, the prevailing judicial view has consistently been that the Act must be accorded as liberal a construction as possible in order not to defeat the intent of Congress.<sup>47</sup> The provision of the Act which permitted the broadest range of judicial discretion was that which extended coverage to employees in occupations related somewhat indirectly to the production of goods for commerce.<sup>48</sup> Under this provision, which strikingly foreshadowed the "Enterprise" concept, the courts could "find few activities that were discernibly related to production not to be 'necessary' to it in a logical sense of that requirement."<sup>49</sup> Thus, for example, janitors,<sup>50</sup> watchmen,<sup>51</sup> and other maintenance employees<sup>52</sup>

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cluding employees handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person:

(3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in production of goods for commerce if the annual gross volume of sales of such enterprise is not less than \$1,000,000. . . .

Pub. L. No. 89-601 § 102(c), 80 Stat. 830 (1966), lowered the minimum gross annual volume test for covered enterprises from \$1,000,000 to \$250,000 for the period after Jan. 31, 1969.

43. The Act has never covered certain classes of employees regardless of the nature of their duties in relation to interstate commerce. The 1966 Amendments have not altered this. Section 213(a)(1) of the Act continues to exempt any person "employed in a bona fide executive, administrative or professional capacity (including any employee employed in the capacity of academic, administrative personnel, or teacher in elementary or secondary school). . . ."

44. 29 U.S.C. § 203(S)(4) (1964), *as amended*, 80 Stat. 832 (1966), provided that schools, hospitals, and related institutions were types of enterprises whose coverage was not subject to the annual gross volume test. Coverage extends also to employees of local transit enterprises, but the states elected not to challenge this provision. Section 203(r)(1) provided that such schools, hospitals and related institutions whether public or private, profit or non-profit would be considered as operated for a "business purpose."

45. In 1947, 1949, 1955, 1956, 1957, 1961, and 1963.

46. 29 U.S.C. § 203(d) (1964), *as amended*, 80 Stat. 830 (1966).

47. *See, e.g.*, Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207 (1959). *See generally* Annot., 40 A.L.R.2d 332 (1955), for narrow construction accorded exemptions under the Act.

48. Fair Labor Standards Amendments of Oct. 26, 1949, ch. 736, § 3(b), 63 Stat. 910.

49. Mitchell v. H. B. Zachry Co., 362 U.S. 310, 314 (1960).

50. *See, e.g.*, Niehaus v. Joseph Greenspon's Son Pipe Corp., 237 Mo. App. 112, 164 S.W.2d 180 (1942).

51. Kirschbaum Co. v. Walling, 316 U.S. 517 (1942). *But see* Hart v. Gregory, 220 N.C. 180, 16 S.E.2d 837 (1941) (Act not so elastic as to cover ordinary night watchman).

52. *See, e.g.*, Kirschbaum Co. v. Walling, 316 U.S. 517 (1942). *See generally* Annot., 12 A.L.R.2d 1131 (1950).



were held to be included, as were employees of a finance company branch office whose work "required them to do any and all things essential to the operation of the . . . office, including its interstate business, such as preparing papers, contracts and reports, and following instructions received by the local office from the supervisory office"<sup>53</sup> in another state.

It is against this background that the States' initial contention must be considered, namely, that their activities, being governmental, non-profit and unparalleled in the private sector, are removed from any legitimate definition of commerce. The issue of sovereignty aside, there is ample authority for holding that the States, in purchasing huge quantities of supplies from out-of-state for use in their schools and hospitals<sup>54</sup> and in receiving federal funds and information,<sup>55</sup> are engaged in commerce or in the production of goods for commerce or in local activities which so affect interstate commerce as to be validly subject to federal regulation. The States, however, stressed another side to the cases; from their point of view the decisions revealed an earnest effort "not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation,"<sup>56</sup> and to shun "talismanic or abstract tests [since] no niceties in phrasing or formula of words could do service for judgment, could dispense with painstaking appraisal of all the variant elements in the different situations presented by successive cases. . . ."<sup>57</sup> An attempt was evident, the States argued, to relate coverage to a showing that the activity to be regulated substantially affected or burdened interstate commerce.<sup>58</sup> The States contended that the Government in the instant case failed to demonstrate what, if any, effect the application or non-application of federal standards would have on the volume of their interstate transactions. They argued that, insofar as their purchases for schools and hospitals were dictated by the number of pupils and patients to be served, their requirements, whether purchased locally or interstate, would not be affected by the nature of their relationship with their employees or by a temporary labor dispute.

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53. *Beneficial Finance Co. v. Wirtz*, 346 F.2d 340 (7th Cir. 1965).

54. Stipulations were based on figures supplied by Maryland, Texas and Ohio, as being representative of all of the States. In 1965, Maryland spent \$8,000,000 for school supplies, 87% of which was in interstate purchases. 269 F. Supp. at 833.

55. *Id.* During fiscal 1967, *e.g.*, the Social Security Administration will pay out 2.35 billion dollars for Medicare hospital services and another 1 billion for physicians services. There is a constant flow of research data, claims and reports between federal and state agencies.

56. *10 East 40th St. Co. v. Callus*, 325 U.S. 578, 582-83 (1945).

57. *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 313, 315 (1960).

58. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964), where the Court stated, "We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel." *See also Kirschbaum Co. v. Walling*, 316 U.S. 517, 523 (1942), where the Court stated:

[T]he Fair Labor Standards Act puts upon the Courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn. The real question is how the lines are to be drawn — what are the relevant considerations in placing the line here rather than there.

Regardless of its intrinsic merit, this argument was not likely to prevail for two reasons: first, the precedents do not suggest that the volume of interstate transactions is the sole determinant of whether an activity sufficiently affects interstate commerce to warrant federal control. If there are other aspects of an activity which would appear to justify congressional authority, the Court may well attach greater significance to these in upholding the legislation. In the area of public schools and hospitals, one factor which affords a basis for federal control is the constant flow of funds and information between Washington and the States. This use of the channels of commerce might suffice to subject the over-all operation to congressional regulation even if all purchases of supplies were made locally and, as the States contended, were unaffected by work-stoppages. The Court, in fact, long ago acknowledged that, "In this [Fair Labor Standards] Act, the primary purpose of Congress was not to regulate interstate commerce as such. It was to eliminate as rapidly as practicable, substandard labor conditions throughout the nation."<sup>59</sup> Under this view of congressional intent, the question of fluctuations in the volume of interstate transactions, while of interest, is not controlling. Second, if there is any one consistent area of agreement permeating all the cases on the extent of the commerce power in the fair labor standards area prior to the passage of the "Enterprise" concept amendment, it is that "Congress deemed the activities of the individual employees, not those of the employer, the controlling factor in determining the proper application of the Act."<sup>60</sup> An employer could not avoid paying the prescribed minimum wage and overtime rates to a maintenance employee determined to be covered by showing that his interstate purchases constituted but a small fraction of his total business which was primarily local in nature or that these purchases were controlled by market factors and not by the employee's activity. By this standard, evidence concerning the impact of State purchases on interstate commerce would be largely irrelevant to a determination of coverage, even prior to the "Enterprise" amendments. Thus, like their argument that the operation of schools and hospitals cannot legitimately be deemed commerce, the States' argument that these activities do not sufficiently affect commerce to warrant federal control is unlikely to be persuasive.

The States' second major contention was that the "Enterprise" amendment was an unconstitutional expansion of congressional power over commerce in that it extended coverage to individuals in no way related to interstate commerce except in an abstract sense. The 1961 amendment does extend coverage to *all* non-exempt employees of an "enterprise engaged in commerce or in the production of goods for commerce." The use of the phrase "enterprise engaged in commerce," on its face, suggests that a new criterion for coverage has been introduced; that it is no longer the activities of the individual employees

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59. *Powell v. United States Cartridge Co.*, 339 U.S. 497, 509-10 (1950). See also *Roland Elec. Co. v. Walling*, 326 U.S. 657 (1946); *Mitchell v. Empire Gas Eng'r Co.*, 256 F.2d 781 (5th Cir. 1958).

60. *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 213 (1959). See also *Wirtz v. R. E. Lee Electric Co.*, 339 F.2d 686 (4th Cir. 1964).

which will govern, but rather, the activities of the employer, or the over-all relation of the enterprise to interstate commerce. It suggests that if the nature and extent of the enterprise's activities bear a sufficiently close connection to interstate commerce to warrant federal regulation, then, and only then, will its employees be covered. This suggestion is grossly misleading. By definition, the enterprise is deemed to be engaged in commerce by virtue of having two or more employees engaged in commerce or in the production of goods for commerce "including employees handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person."<sup>61</sup> The congressional supporters of the measure viewed this as simply a "restatement of the criteria used in the original Fair Labor Standards Act and the subsequent Amendments."<sup>62</sup> A federal district court in *Wirtz v. Edisto Farms Dairy*<sup>63</sup> stated that, "[t]he Congress was careful to retain the existing criteria of whether employees have 'engaged in commerce' or 'production of goods for commerce' as the test to determine whether an enterprise is subject to the Act. The basic test remains the actual type of commerce engaged in by employees."

It is manifestly one thing, however, to use this criterion when coverage is confined exclusively to the individual so engaged; it is quite another to use it for conferring vicarious coverage on all of his fellow-employees. This is stretching the Fair Labor Standards Act "to the extent that sophistical argumentation can stretch its scope."<sup>64</sup> The same means used to achieve two such qualitatively different ends may not be equally legitimate. To the degree that the argument of the States can be said to imply that the only valid test for enterprise coverage is the nature of the *employer's* relation to interstate commerce, it raises serious doubt as to whether the cases decided before 1961 should be dispositive of the present issue. Judge Winter, nonetheless, found them to be so. Indeed, from these authorities he concluded that,

[I]n adopting the enterprise concept Congress did not exercise to the limit its full power to regulate commerce because application of the enterprise concept is conditioned upon the presence of some employee directly engaging in commerce, producing goods for commerce or handling goods in commerce. . . . The enterprise concept could have been conditioned upon some employee engaging in local activity 'affecting commerce' short of the actual interstate activity previously mentioned.<sup>65</sup>

On the other hand, the *Edisto* court stated, by way of dictum, that insofar as Sec. 3(s)(3) "sets no standard for the number of employees who must be engaged in interstate commerce before an enterprise is deemed to engage in interstate commerce, it appears that the statute does go far towards invading the field of intrastate commerce

61. 29 U.S.C. § 203(s)(3) (1964).

62. S. REP. NO. 145, 87th Cong., 1st Sess., 2 U.S. CODE CONG. & AD. NEWS 1620 (1961).

63. 242 F. Supp. 1, 5 (D.S.C. 1965).

64. *Powell v. United States Cartridge Co.*, 339 U.S. 497, 523 (1950). (Justice Frankfurter's dissenting opinion).

65. *Maryland v. Wirtz*, 269 F. Supp. 826 (D. Md. 1967).

where the provisions of the Act should not be effective."<sup>66</sup> This, too, readily suggests the view that the appropriate criterion for determining enterprise-wide coverage without exceeding the bounds of authority should not be one based on activities of some, but not all, of the employees of the enterprise. More appropriate might be a standard which reflects the overall relation of the enterprise to interstate commerce, as, for example, a definition of a covered enterprise in terms of a specified percentage of the total number of employees engaged in interstate commerce and exerting a sufficient impact thereon to warrant federal control. The power to make a determination of coverage in these terms, concededly still somewhat arbitrary, would seem to be more fairly incident to the congressional power over commerce than the standard actually adopted. Even so, the ultimate question would remain, does Congress constitutionally have the power, under *either* criterion to regulate the wages and hours of individuals in no way directly connected with interstate commerce?

The lower courts, prior to the instant case, have not answered this question. In the two cases in which the constitutional issue was posed,<sup>67</sup> the "Enterprise" concept was upheld solely on the ground that a congressional enactment is presumed to be constitutional unless proven otherwise and that those attacking it had not sustained their burden of proof. However, the real obstacle the States face in their attempt to have the Supreme Court strike down the "Enterprise" concept is the Court's candid recognition, previously referred to, that the primary object of Congress under this Act was not the regulation of interstate commerce as such, but the regulation of labor relations. Not only has the Court heretofore sustained the validity of this aim as an incident of the commerce power, but it has accorded the Act a liberal construction so as not to defeat the congressional intent. As a pretext for coverage, the "Enterprise" concept is no more transparent than the pretext that janitors are engaged in activities "directly essential" to production for commerce. On grounds of policy,<sup>68</sup> the Court may be as willing to accept the one as it has been to accept the other.

But even if the operation of schools and hospitals affected commerce, and even if the "Enterprise" concept was a constitutional exercise of the commerce power, the States contended that they were immune from coverage by virtue of the tenth amendment. In support of this contention, the States cited the proposition, often repeated, that there are certain local activities which, though exerting some effect on interstate commerce, are not subject to regulation by the national government.<sup>69</sup> Briefly stated, their contention was that the

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66. *Wirtz v. Edisto Farms Dairy*, 242 F. Supp. 1, 5 (D.S.C. 1965).

67. *Id.* at 1; *Goldberg v. Ed's Shopworth Supermarket, Inc.*, 214 F. Supp. 781 (W.D. La. 1963).

68. See, e.g., C. B. SWISHER, *THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES* 237-39 (2d ed. 1963), for a discussion of a new type of federalism "in terms of aggregations of power rather than in terms of concepts of sovereignty."

69. See, e.g., *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 650 (1944). "Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity."

very existence of the States, which possess general authority to regulate matters of local concern, necessarily implied a limitation on the power granted to Congress; that without such an implied limitation, "the concept of a legally-defined federalism, judicially umpired [had] . . . no substance;"<sup>70</sup> that the States would then exist at the sufferance of the federal government; and that the States would, as a result, be relegated to the status of mere administrative agencies.

As the stipulated facts in the case show, the new law would greatly interfere with the fiscal independence and integrity of the States and would, in some instances, require amendments to State constitutions.<sup>71</sup> It was on this aspect of the case that the court found itself most sharply divided. Judge Winter suggested that the States were conjuring up the "horribles" and that, in any event, the financial problems of the States were "irrelevant" to the constitutional issue,<sup>72</sup> which he resolved in favor of the Government. Judge Thomsen, concurring in part, concluded that, while the minimum wage provisions did not unduly interfere with State sovereignty, the overtime provisions probably did transgress the permissible limits. This problem, he felt, would have to be dealt with "in the context of particular cases, when the extent of the interference with an indispensable state function can be weighed against the effect, if any, which the State's overtime practices have on interstate commerce."<sup>73</sup> In an impassioned dissent, Judge Northrop condemned the "mandatory allocation of state-collected revenues by Congress as . . . an intrusion of the first magnitude into the function of state government . . ."<sup>74</sup> [carrying with it] the formula for the destruction of the concept of federalism [embodied in the Constitution]."<sup>75</sup>

There is much broad language in the case to support Judge Winter's view that the power of Congress over commerce is "plenary," "exclusive," and "paramount."<sup>76</sup> Yet no court, least of all the Supreme Court, has yet pronounced the tenth amendment an anachronism. Quite to the contrary, the most frequently repeated caveat is that federal power must be interpreted with due regard "to the implications of our dual system of government."<sup>77</sup> Examination of the authorities bears out Justice Frankfurter's observation that, "[p]erhaps in no

70. C. BLACK, *PERSPECTIVES IN CONSTITUTIONAL LAW* 25 (2d ed. 1965). For a discussion of the implied limitations doctrine, see *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942). See also *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (dissenting opinion); *Champion v. Ames*, 188 U.S. 321 (1902) (dissenting opinion).

71. This is because many states are already taxing at the maximum rate permitted by their constitutions.

72. 269 F. Supp. at 837, 846.

73. *Id.* at 852.

74. *Id.* at 854.

75. *Id.*

76. See, e.g., *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570 (1943) ("Congress did not exercise in this Act the full scope of its commerce power."); *Board of Trustees v. United States*, 289 U.S. 48, 56-57 (1933) ("It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by State action."); *Sanitary District v. United States*, 266 U.S. 405, 426 (1925) ("[P]ower of national government to remove obstructions to interstate and foreign commerce . . . is superior to that of the States to provide for the welfare or necessities of their inhabitants").

77. *A. B. Kirschbaum Co. v. Walling*, 316 U.S. 517, 520 (1943).

domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States."<sup>78</sup> The cases reveal a continuous, pragmatic, fact-oriented "process of accommodation as between assertions of new federal authority and historic functions of the individual States."<sup>79</sup>

With no noticeable straining of decisions, the States distinguished those cases apparently most damaging to the cause of State sovereignty as (1) not in point;<sup>80</sup> (2) involving direct clashes of state and national sovereignty wherein federal power must prevail under the supremacy clause;<sup>81</sup> (3) involving "non-essential" activities, such as the operation of railroads, which clearly burden commerce;<sup>82</sup> (4) involving commercial activities in competition with private enterprise;<sup>83</sup> and (5) involving decisions under the aegis of other powers granted the federal government.<sup>84</sup> The sole case<sup>85</sup> involving an essential, non-profit, uniquely governmental activity, the operation of a state penal institution, was decided in favor of the federal government in a memorandum decision based, not on the constitutional issue, but on a question of statutory construction. With much persuasive force, the States contended that limitations heretofore imposed on the federal taxing power<sup>86</sup> must now be imposed on the commerce power, since the exercise of the one can destroy as effectively as the other if it is permitted to encompass State fiscal and budgetary functions at the whim of Congress.<sup>87</sup>

From the foregoing discussion, it becomes readily apparent that the authorities give scant support to the States' contention that their

78. *Id.* at 520.

79. *Id.*

80. *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950), did not involve state or local governmental institutions. The narrow holding in *Public Building Authority v. Goldberg*, 298 F.2d 367 (5th Cir. 1962), concerned coverage of maintenance employees, not coverage of the government employees working in the building.

81. *Case v. Bowles*, 327 U.S. 92 (1946); *Board of Trustees v. United States*, 289 U.S. 48 (1933).

82. *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *United States v. California*, 297 U.S. 175 (1936).

83. *California v. United States*, 320 U.S. 577 (1944) (waterfront terminal operations conducted by the State competing with privately owned terminals).

84. *Case v. Bowles*, 327 U.S. 92 (1946) (war power); *Sanitary District v. United States*, 266 U.S. 405 (1925) (the treaty power).

85. *United States v. Ohio*, 385 U.S. 9 (1966).

86. *See, e.g., Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477 (1939), where the Court said, "[T]he theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other." *See also New York v. United States*, 326 U.S. 572 (1946).

87. *See New York v. United States*, 326 U.S. 572, 594 (1946), where Justices Black and Douglas, dissenting, state:

"The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." In this case, federal taxation of State sales of mineral water was upheld. To the extent that the federal government may impose a non-discriminator tax on "proprietary" activities of a State, the analogy between the tax power and the commerce power urged by the states may fail or be reduced merely to a classification of state activities as either "proprietary" or "governmental."

operation of schools and hospitals neither constitutes commerce nor substantially affects interstate commerce. The uniquely governmental character of their activities in this area and the lack of a profit motive constitute no bar to federal regulation. The constitutionality of the "Enterprise" concept was upheld on the same grounds of policy which sustained expansion of Fair Labor Standards Act coverage to a host of fringe occupations only remotely connected with interstate commerce.

By far the most crucial of the States' contentions was the argument that the attempted coverage of state employees violated state sovereignty and threatened the continued existence of the federal system. In a sense, the broadest contours of the sovereignty issue are located in the necessary and proper clause of the Constitution, as, analogously, the broadest basis for coverage under the Fair Labor Standards Act (prior to the "Enterprise" concept) was provided by the clause on related activities essential to production for commerce. The Court, writing in another context, recently warned against expanding the necessary and proper clause to include activities not properly incident to the execution of powers specifically granted the federal government.<sup>88</sup>

The approach taken by the court was evocative of that taken in other vexatious areas of constitutional interpretation, such as cases involving search and seizure or anti-trust problems. That which is "fairly incident" emerges as that which is not "unreasonable." With this approach, the "undue interference" test of Chief Judge Thomsen in the instant case is strikingly consonant. Should this approach continue to prevail, the pre-eminent problem will be that of determining what is unreasonable or unduly burdensome and, therefore, not "fairly incident." Such an approach necessarily implies unspectacular decisions, narrowly confined to the facts of the individual case. Sweeping injunctions and generalizations concerning the nature and limits of state and national power are ill-adapted to effect such a process of practical accommodation.

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88. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960). See also *United States v. Darby*, 312 U.S. 100 (1941), where the Court said:

Congress . . . may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.